Petition

NO. 81 6081

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IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL ALBERT CERVI,

Petitioner,

v.

GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether a conviction and sentence of death is constitutionally permissible when imposed by an all-white jury, selected from a county whose population is predominantly black, following the systematic exclusion for cause of eighty-nine (89) prospective black jurors.

    (a) Whether the removal for cause of eight (8) prospective jurors because of their conscientious or religious scruples against the death penalty violated petitioner's rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the exclusionary rule of Edwards v. Arizona, 101 S.Ct. 1880 (1981), is circumvented when police authorities of one State initiate interrogation of and obtain a written statement from a prisoner incarcerated in another State, who had earlier invoked his right to have counsel appointed and present during custodial interrogation.

    (a) Whether the willful and intentional refusal by Iowa authorities to allow appointed counsel initial access to his client until a written statement had been obtained by Georgia authorities violated petitioner's rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

3. Whether the constitutional protection afforded a criminal defendant by Simmons v. United States, 390 US 377 (1968), in the guilt/innocense phase of this trial should be extended to the sentencing phase, particularly when the death penalty is imposed.

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NO. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

MICHAEL ALBERT CERVI,

Petitioner,

v.

GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner MICHAEL ALBERT CERVI respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The Opinion of the Supreme Court of Georgia is reported at 248 Ga. 325, _____SE2d _____ (1981), and is attached hereto as Appendix A. Denial of petitioner's motion for rehearing, together with modification of original Opinion, is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered September 29, 1981. A timely petition for rehearing was denied on October 20, 1981. On December 14, 1981, Mr. Justice Powell signed an Order extending to and including January 18. 1982 time for petitioner's filing of petition for writ of certiorari to the

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Supreme Court of Georgia. Copy of said Order of extension of time is attached hereto as Appendix C.

This Court's jurisdiction is invoked pursuant to 28 USC §1257(3), petitioner having asserted below, and asserts herein, deprivation of rights secured by the Constitution of the United States.

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person shall be. . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ";

the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.";

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> ". . .[N]or shall any State deprive any person of life, liberty, or propefty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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STATEMENT OF THE CASE

In February, 1977, petitioner MICHAEL ALBERT CERVI was a twenty-year-old enlisted man in the United States Navy. He was stationed in Charleston, South Carolina, and assigned to the U.S.S. Santa Barbara, an ammunition ship which had just completed a cruise involving more than six months' sea duty. Cervi was a product of an apparently normal Catholic home in Oakland, Alameda County, California. His family consisted of himself, a brother two years younger; his Mother, Juanita Cervi; and his now-deceased father, Bernal M. Cervi, a homocide investigator for the Alameda County Sheriff's Department. He was graduated from high school with average grades and, after a period of teenage uncertainty, enlisted in the United States Navy to get his military obligation behind.

After returning from sea duty on the U.S.S. Santa Barbara, he was unable to obtain a requested thirty-day leave, which was sought for the purpose of returning to Oakland and marrying his high school girlfriend, Cindi Yip. Frustrated by the denial of his leave request, he determined to go AWOL, an Army parlance but which the Navy refers to as "UA" (unauthorized absence).

On Friday, February 25, 1977, Cervi and a shipmate, Robert Wilson, from Omaha, Nebraska, were at a party and, after discussing their mutual disgruntlement, decided to leave together. Cervi had earlier purchased a .30 .30 rifle from another shipmate, Homer M. Hill, who was married and lived off Post in Charleston, South Carolina. Since Cervi could not send the weapon home via mail, he determined to carry it with him and, on Saturday, February 26, he and Robert Wilson went to Hill's residence and obtained the rifle. Thereafter, they commenced hitchhiking from Charleston in a generally Westward direction. After progressing approximately twenty (20) miles, they spent the night under the shelter of an overpass and, on Sunday, February 27, they were given a ride to the vicinity of Columbia, South Carolina. At approximately twelve

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o'clock noon, the deceased, Dr. Kenneth G. Lawrence, picked them up in a 1976 Ford, Ltd., and offered to give them a ride to Atlanta, Georgia, where he was headed on route to Chicago for the purpose of attempting to regain his license to practice medicine in South Carolina, earlier lost because of several felony convictions.

Together they traveled on the Interstate, I-20, to Augusta, Georgia, where they stopped briefly to get hamburgers. While Dr. Lawrence was inside, Cervi and Wilson decided that they would steal his car and use it as transportation. Since Cervi was riding in the back seat, the agreement was that upon a designated signal from Wilson (handing Cervi a cigarette), he (Cervi) was to remove his .30 .30 rifle from the seabag and order Dr. Lawrence to pull off the side of the road and they would tie him to a tree and steal the car.

As they proceeded West on I-20 toward Atlanta, the plan was effectuated and Dr. Lawrence was instructed to take the U.S. 278 exit toward Crawfordville, Georgia. Wilson took ten (10) one-hundred-dollar ($100.00) bills from Dr. Lawrence in the process and, after offramping I-20 onto U.S. 278, Wilson instructed the doctor to pull over to the side of the road several miles thereafter.

As they departed from the vehicle, Wilson took the .30 .30 rifle from Cervi and loaded it with three (3) shells, and together they proceeded to march the deceased approximately one hundred fifty (150) yards into the woods. Thereafter, they agreed to tie Dr. Lawrence to a tree with his necktie, but after completing this, Wilson suddenly and unexpectedly began striking him in the head with the butt of the .30 .30 rifle. After Dr. Lawrence became semi-conscious, Wilson turned to Cervi, pointing the rifle at him (Cervi) and said, "We gotta do it." "Use my knife." At this juncture, Cervi walked toward Dr. Lawrence, who was still semi-conscious, and stabbed him once in the neck; whereupon, Wilson

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said, "Again", and Cervi stabbed Dr. Lawrence for a second time, became nauseous and returned to the car.

Wilson rejoined him shortly thereafter and together they departed.

On Monday, February 28, they spent the night in a motel in Birmingham, Alabama; and on Tuesday, March 1, they drove to Nashville, Tennessee, again spending the night in another motel. By Wednesday, March 2, they were in Missouri en route to Wilson's home in Omaha, Nebraska, but spent that night in the car parked on the side of the road. On Tuesday, March 3, they departed Missouri and entered Iowa --- still en route to Omaha (from which Cervi intended to fly to California). Shortly after 9:00 P.M., the vehicle (with Cervi driving) was stopped by a Mills County (Iowa) Sheriff's Deputy, who charged him for driving 63 miles per hour in a 55 miles-per-hour zone. Wilson was asleep in the back seat at the time and, because of the weather, Cervi accompanied the deputy to the patrol car, but was unable to produce a satisfactory document to explain either possession of the vehicle or his absence from the Navy.

In the interim, the deputy conducted an NCIC check, based on Cervi's Social Security number, and shortly thereafter ascertained that both Cervi and Wilson were wanted for murder.

Subsequently, both were incarcerated; help was summoned; and they were taken to Glenwood, Iowa, jail. At approximately 4:00 P.M., in the afternoon of Thursday, March 3, 1977, both Cervi and Wilson were taken before a magistrate, who inquired of them whether they wished to have an attorney appointed. Both parties answered affirmatively and the magistrate immediately directed County Attorney Walter Green (the equivalent of Georgia's District Attorney), who was present representing the State, to obtain counsel for the two. Green immediately called James Thomas, another local attorney who informed him that business conflicts would not permit him to see either defendant that afternoon, but

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that he would confer with them the next morning prior to the extradition hearing, scheduled to be held at 10:00 A.M. Green then relayed this to the magistrate and the hearing was concluded with both Cervi and Wilson being placed in solitary confinement for the night.

On Friday, March 4, James Thomas, Cervi's appointed counsel, appeared at the county jail prior to 9:00 A.M., and requested the Mills County Sheriff, Merle Brown, to make his clients available for interview. After receiving an evasive response, some time passed; another request was made, which was likewise unproductive. Thereafter, Thomas approached County Attorney Green on two separate occasions and demanded to see his clients --- a request which Green denied. In the interim, Toombs Judicial Circuit District Attorney Kenneth E. Goolsby, accompanied by Georgia Bureau of Investigation Agents Ingram and Cook, upon learning of the arrest, had flown directly to Mills County, Iowa, for the purpose of obtaining statements from the defendants.

During the period in which petitioner's appointed counsel, James Thomas, was being frustrated by State authorities in his efforts to confer with his clients, Cervi and Wilson (both of whom were not informed as to their attorney's presence or as to his efforts to see them), consented to interviews with GBI Agents, which culminated in written confessions which commenced respectively at 10:05 A.M., and 10:16 A.M.

On the following day, Saturday, March 5, 1977, Cervi, Wilson, GBI Agents Cook and Ingram, and District Attorney Goolsby departed Iowa via airplane en route to Atlanta, Georgia, and, ultimately to their place of incarceration in Thomson, McDuffie County, Georgia. Both were indicted by the Grand Jury on charges of murder, kidnapping, armed robbery, and motor vehicle theft.

Subsequently, petitioner was tried separately on these charges, by a jury in Taliaferro County, Georgia, a small rural community whose population is 64% black. During jury selection, eighty-nine (89) prospective black jurors expressed opposition to

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the death penalty and, in each instance, the trial judge ordered them disqualified. Many of these jurors were excused for grossly insufficient reasons. Because of this practice of arbitrarily excusing every prospective black juror who voiced any concern regarding the death penalty, petitioner was tried before an all-white jury with two (2) white alternates. This imbalance, in a county almost two-thirds (2/3) black, deprived petitioner of a trial by a true cross-section of the community.

By a motion to suppress and a motion in limine, heard outside the jury's presence, petitioner sought to exclude from evidence the written statement obtained in Iowa by Georgia authorities. Testimony developed at this hearing established that petitioner unequivocably requested the assistance of counsel eighteen (18) hours before his interrogation began; that the Iowa magistrate immediately appointed attorney Thomas as petitioner's counsel; that petitioner was not informed of the fact that counsel had been appointed or that counsel was present demanding to see him well prior to his interrogation and incriminating statement; that Iowa police authorities prevented attorney Thomas, on five (5) separate occasions, from seeing petitioner; all of which occurred before the written statement was commenced.

These motions were denied. Petitioner's statement was offered into evidence, and the jury convicted petitioner on all charges.

During the sentencing phase of his trial, petitioner took the stand to testify, along with several witnesses, in mitigation.

The District Attorney had no evidence in aggravation, but sought nonetheless to inflame the jury by a tactic as deplorable as any ever encountered in the courtroom. He questioned petitioner about the motion to suppress hearing held solely to determine the constitutionality of introduction of petitioner's written statement into evidence, and petitioner's testimony thereat. During that proceeding, the District Attorney had improperly asked

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if the contents of petitioner's statement were true; whereupon, counsel instructed petitioner to invoke the privileges granted him by the Fifth Amendment to the Constitution of the United States, and instructed petitioner not to respond. Apparently emboldened by this, the District Attorney, on sentencing, inquired:

> "Q. And you are a Christian? . . . You have testified in this case before today, haven't you?
>
> "A. Yes, sir. I have.
>
> "Q. And you were a Christian then, weren't you?
>
> "A. Yes, sir. I was.
>
> "Q. And you took the Fifth Amendment of the Constitution of the United States, didn't you?"
>
> (T 1063).

Motions for mistrial were promptly made, re-made, and denied. The jury, whose only function at this juncture was to determine the issue of life or death, reacted predictably and imposed three (3) death sentences. Petitioner's co-defendant, Robert Wayne Wilson, who was tried separately on the same charges under exactly the same evidence, was also convicted; but he was sentenced to life imprisonment.

Timely motion for new trial was made and denied. Thereafter, this ruling was appealed to the Georgia Supreme Court and, on September 29, 1981, that Court, by a majority of four (4) justices (one dissenting, one absent, and one concurring in judgment only), affirmed both conviction and sentence. (A 1-9).

Following a motion for rehearing, that opinion was modified to set aside petitioner's sentence to death for armed robbery and remanded for re-sentencing as to that offense. (Appendix B).

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HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. At the conclusion of the general voir dire and jury selection, petitioner challenged the array of the petit jury selected to try him, and renewed and modified a pending motion for change of venue based on the fact that it did not constitute a true cross-section of the community, a right guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution.

Both motions were decided by the trial court, and this ruling was affirmed on appeal by the Supreme Court of Georgia. (R-131; T-530).

2. Prior to trial, by motion to suppress, as amended, and by motion in limine, petitioner challenged the constitutionality of the introduction into evidence of his written statement, obtained by Georgia police authorities who interrogated him while incarcerated in Iowa. (T 316) (R-21-23, Part II). This motion was denied, and on appeal the Supreme Court of Georgia again affirmed the trial court's ruling. (A-2, Division 2).

3. During the sentencing phase of petitioner's trial, the District Attorney presented to the jury testimony which violated petitioner's right against self-incrimination, as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution. (T 1063). Counsel promptly moved for mistrial, which motion was subsequently renewed, and also that the trial judge censure, or reprimand the District Attorney in the presence of the jury. These motions and requests were denied, and the Georgia Supreme Court again affirmed the holding. (A-3, Division 7) (T 1076, 1083, 1089).

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REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ARBITRARY EXCLUSION FOR CAUSE OF EIGHTY-NINE (89) PROSPECTIVE BLACK JURORS DEPRIVED PETITIONER OF HIS RIGHT TO TRIAL BEFORE A FAIR CROSS-SECTION OF THE COMMUNITY, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court has frequently and unequivocably declared that the American concept of jury trial contemplates a jury drawn from a fair cross-section of the community. Since due process of law, and a fair trial, within the meaning of both the United States Constitution and the Constitution of the State of Georgia have been repeatedly construed to require this, reality dictates scrutiny of the jury ultimately impanelled to try the case.

Juries, as instruments of public justice, must be truly representative of the community and not the organ of any special group or class. Smith v. Texas, 61 S.Ct. 164, 165; 331 US 128, 130; 85 LEd2d 690 (1975). When viewed in this light, both law and logic are offended by the hollow litany that if the initial source is not infected, the final result is inconsequential.

That refrain is particularly meaningless in this case, as the following figures show:

(a) Of the first jury panel called (a total of 83 persons), 48 were blacks. Of this group of 48 blacks, 47 were held to be disqualified under Witherspoon v. Illinois, 391 US 510 (1963);
(T 7-83; T 531, 532).

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(b) Of the second jury panel, (a total of 96 persons), 50 were blacks. Forty-two (42) of these 50 blacks were held to be disqualified under Witherspoon; (T 318-372; T 531, 532).[1]

(c) In both jury panels, a total of 89 blacks expressed varying degrees of concern about the imposition of a death penalty. All 89 blacks were held to be disqualified under Witherspoon regardless of their responses, many of which were clearly inadequate.

(d) It can be calculated, then, that of the 98 blacks impanelled on the traverse jury, 89 of them (or 90.8%) were excluded from sitting on the traverse jury from which the petit jury was to be selected. This means that in a community which is 63.6% black (according to the "1977 County and City Data Book", published by the U. S. Department of Commerce, Bureau of the Census, Washington, D. C. 20402), blacks were represented by 5% (9 out of 179) of the traverse jury total, and only 2.2% of the panel petitioner selected from.

---

1. During the actual trial, petitioner's counsel cited figures to the trial judge, based upon his personal notes and computations, regarding juror disqualification. They were offered in support of a challenge to the array of the petit jury and a renewed motion for change of venue. (T 531, 532). Unfortunately, they are incorrect, since 101 of 109 black jurors were not disqualified; rather 89 of 98 were disqualified, as set out in the body of the petition.

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This whimsical method of excusing blacks from jury service, yet simultaneously retaining whites, is judicial folly and precludes forever the possibility that a defendant in a capital case would be tried before a constitutional cross-section of the community. While statistics can often be deceiving, there is no escaping the validity and impact here.

In a community that was 64% black, all the jurors and alternates were white. Moreover, only 2.2% of the traverse jury panel from which petitioner's jury was chosen, were black --- a disparity of 62%. While absolute numerical parity by race or sex is neither required nor desired, this gulf cannot be explained by happenstance.

At the conclusion of voir dire, petitioner's counsel informed the trial court of these figures, and formally challenged the array of the petit jury thus impanelled. (T 531-532; R 121). A pending motion for change of venue was renewed and also expanded to encompass the lack of community cross-section complained of. (T 531; R 104-114). Both were denied.

As pointed out by Justice White in Duren v. Missouri, 99 S.Ct. 664, 670 n. 26; 439 US 357, 368; 58 LEd2d 579 (1979),

> "[I]n Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section. The only remaining question is whether there is an adequate justification for the infringement."

The record affords no justification for the infringement presented here. In some thirty-seven (37) separate instances, prospective black jurors expressed conscientious objections to the death penalty. When asked by the prosecutor if that meant

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they would be unable to render a verdict giving the death penalty, they answered, "No!". [2]

These responses indicate that either the veniremen should not have been excluded or that they did not understand the question posed. If it was true that they did not understand the question, then clarifying questions should have been asked. As it is, the State's questioning of members of the venire simply did not go far enough to disqualify them. Burns v. Estelle, 626 F2d 396, 397 (5th Cir. 1980).

The persistent, arbitrary, unjustified disqualification of jurors who composed the largest ethnic group in the community violated petitioner's constitutional right to a fair trial. This imbalance could have been avoided by proper application of Witherspoon, or through the granting of petitioner's renewed motion for change of venue when the lack of a true cross-section was clearly apparent. Since neither occurred, the conviction and death sentence should be set aside.

---

2. The jurors who so responded are as follows: Manago, T 17; Fanning, T 20; Moore, T 33; Manago, T 44; Swain, T 48; Evans, T 49; Dotson, T 52; Landrum, T 53; Lewis, T 60; Stephens, T 61; Dunn, T 62; Edwards, T 65; Johnson, T 69; Moore, T 73; Evans, T 329; Sneed, T 331; Burke, T 340; Rucker, T 342; Harris, T 343; Hatney, T 345; Bolton, T 347; Richardson, T 348; Evans, T 352; Thomas, T 353; Thomas, T 355; Alexander, T 355; Kennedy, T 356; Lewis, T 357; Fuller, T 357; Lewis, T 358; Sherer, T 362; Glover, T 364; Chenault, T 365; Andrews, T 365; London, T 366; Manago, T 367; and Jones, T 368.

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IA.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE REMOVAL FOR CAUSE OF EIGHT (8) JURORS WITH CONSCIENTIOUS OR RELIGIOUS SCRUPLES AGAINST THE DEATH PENALTY VIOLATED THE COURT'S HOLDINGS IN WITHERSPOON v. ILLINOIS, 391 US 510 (1968) AND ADAMS v. ILLINOIS, 448 US 38 (1980).

This Court, in Adams v. Texas, 448 US 38; 65 LEd2d 581 (1980), reaffirmed its consistent teaching that the Sixth and Fourteenth Amendments do not permit a State to challenge prospective jurors for cause merely because of their "views about capital punishment, unless those views would prevent or substantially impair the performance of [their] duties . . . ." Accord: Witherspoon v. Illinois, 391 US 510 (1968); Boulden v. Holman, 394 US 478 (1969); Maxwell v. Bishop, 398 US 262 (1970); Mathis v. New Jersey, et al., 403 US 946 (1971) (per curiam); Davis v. Georgia, 429 US 122 (1976). The Court in Adams insisted that,

> ". . . neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or inability . . . to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. . . ."

Adams, supra, 448 US, at 50; 65 LEd2d at 593, and reiterated that only those veniremen

> ". . . who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the

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trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.'"

Id., 448 US 38, 44; 65 LEd2d 581, 589, quoting Witherspoon, supra, 391 US at 522, n. 21, may properly be excluded.

In the present case, Witherspoon and Adams appear to have been plainly disregarded. Indeed, the trial court permitted excusal of precisely the sorts of jurors Witherspoon and Adams were framed to protect.

For example, prospective juror Edna Swain was questioned by the District Attorney:

"Q. And does that mean that under no circumstances could you render the death penalty?

"A. No."

(T 48).

Without amplification, clarification, or explanation of this ambiguous response, this juror was excused for cause:

"THE COURT: All right. You might be excused from court.

"(Juror excused)." (T 49).

Examination of prospective jurors Joyce Landrum (T 53, 54), Mamie Bell Stephens (T 61), Willie Lee Johnson (T 67, 68), William Paul Murray (T 77, 78), and Dorothy Sneed (T 331), followed this format precisely. The same question quoted above elicited the same response. They, too, were excused for cause.

Nowhere does there appear in the examination of these six jurors even a hint of "unmistakably clear" resolve "automatically" to vote against capital punishment "without regard to any evidence developed at trial". There is certainly no basis in the

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record to suggest an inability to impartially determine the question of guilt. Yet, nonetheless, they were all excused.

Neither can disqualification of prospective juror Annie Grace Bolton be justified by Witherspoon and Adams standards. After stating a conscientious objection to the death penalty, she testified that under no circumstances could she write a verdict giving the death penalty. (T 40, 41). Judge B. Avant Edenfield held, when faced with this exact situation, that such a response does not express the absolute, unambiguous opposition to the death penalty in all circumstances that Witherspoon requires. Alderman v. Austin, 498 FSupp 1134 (S.D. Ga. 1980).

Finally, examination of voir dire reveals a venireman who, after expressing his conscientious opposition to the death penalty, goes on to state that he could not be for, or would want to, impose such a penalty. Venireman Kenneth Charles Thornton responded thusly:

> "MR. GOOLSBY: Does that mean that under no circumstances could you render the death penalty in any case, regardless of the facts or circumstances?
>
> "MR. THORNTON: I wouldn't want to do it.
>
> "MR. GOOLSBY: Not if you want to do it. Could you do it?
>
> "MR. THORNTON: No, I don't think I could."
>
> (T 333).

In this instance, the responses fall impermissibly short of the standards employed for exclusion by Witherspoon and its progeny. In Lockett v. Ohio, 98 S.Ct. 2954, 438 US 586, 57 LEd2d 973 (1978), this Court pointed out that it should have been inquired into whether, despite his convictions, this juror could put aside his optional beliefs and do his duty as a citizen.

In sum, none of these jurors exhibited that fixed opposition to the death penalty which alone might have warranted

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their exclusion for cause. Yet each was excluded by the trial court, and the Supreme Court of Georgia on appeal held that the prospective jurors' opposition to capital punishment met the Witherspoon test. In light of the clear violations in this case, petitioner respectfully submits that either summary reversal of his death sentence, or vacation of his sentence with a remand for reconsideration in light of Adams v. Texas, supra, is warranted.

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II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER INTRODUCTION OF A WRITTEN STATEMENT, OBTAINED BY GEORGIA AUTHORITIES AFTER INTERROGATION OF AN IOWA PRISONER WHO HAD EARLIER INVOKED HIS RIGHT TO HAVE COUNSEL APPOINTED AND PRESENT, VIOLATED PETITIONER'S RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The facts necessary to evaluate the admissibility at trial of petitioner's statement are undisputed:

1. At approximately 9:27 A.M., on the morning of March 3, 1977, petitioner and ROBERT WAYNE WILSON were arrested in Glenwood, Iowa, for speeding. (T 616).
2. At approximately 4:00 P.M., that afternoon, both prisoners were taken before Mills County Magistrate Engle, who informed petitioner of his right to counsel and gave the prescribed Miranda warnings. Petitioner unequivocably invoked his right to counsel, whereupon proceedings were continued by Magistrate Engle until 10:00 A.M., the following day. (T 246-248; T 1318, 1319).
3. Magistrate Engle then directed H. Walter Green, County Attorney for Mills County, Iowa, to secure counsel for petitioner. At approximately 4:15 P.M., Green telephoned James A. Thomas, a Glenwood, Iowa, attorney, who accepted the appointment and agreed to represent petitioner. Thomas informed Green that he (Thomas) was unable to confer with petitioner that day but would do so prior to the re-commencement of proceedings set 10:00 A.M., March 4, 1977. (T 184; T 1344-1347).
4. That evening and night petitioner was kept in solitary

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confinement in the jail located across the street from the Mills County Courthouse. At about 9:00 A.M., the next morning, March 4, 1977, petitioner was taken to the office of Mills County Sheriff Brown, also located in the courthouse. (T 273).

5. Between 9:00 and 9:15 A.M., on March 4, 1977, attorney Thomas arrived at the courthouse and requested to see his clients. Sheriff Brown denied this request. At 9:30 A.M., (a time fixed by stipulation of all concerned), attorney Thomas confronted County Attorney Green and Georgia District Attorney Goolsby, and twice again requested to see petitioner. This, too, was refused by County Attorney Green in District Attorney Goolsby's presence. At 9:45 A.M. (also fixed by stipulation), attorney Thomas repeated this same demand to County Attorney Green (again in District Attorney Goolsby's presence), but was still denied access to petitioner. (T 184-188).

6. Petitioner was never informed that attorney Thomas had been appointed to represent him or that Thomas was present at the courthouse demanding to see him (petitioner). (T 247-248).

7. Georgia District Attorney Goolsby and two Georgia Bureau of Investigation agents were present in Glenwood, Iowa, for the express purpose of interrogating petitioner in hopes of obtaining a statement. (T 857).

8. GBI Agent Ingram testified that petitioner's written statement was begun at 10:06 A.M., March 4, 1977, and completed at 10:56 A.M., March 4, 1977. (T 921-925).

9. Petitioner was not permitted to confer with his attorney until after the written statement was complete.

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In Edwards v. Arizona, 101 S.Ct., 1880 (1981); _____US___, this Court declared:

> ". . .[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.[8] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." Id., at 1884, 1885.

That holding, it would seem, affords little room for misinterpretation. The Georgia Supreme Court, however, thought otherwise, mistakenly stating:

> ". . . Furthermore, the Georgia authorities were completely unaware of the appointment of counsel. . . .". (A-3).

It then concluded:

> ". . . Therefore, we hold that, under the the facts of this case, the appointment of counsel by one jurisdiction for the limited purpose of representation at a probable-cause hearing and extradition proceeding, did not prevent the appellant from giving an informed

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waiver of counsel prior to interrogation by the requesting state. . . ." (A-3, A-4).

There is not a shred of evidence anywhere in the record of this case suggesting a "limited purpose representation"/[3] by petitioner's counsel Thomas. Neither does it matter whether Georgia police authorities or Iowa police authorities, or both, were at fault. What is important, however, is the fact that petitioner invoked his constitutional right to counsel, who he was not permitted to see until a written statement was first obtained by State authorities initiating the interrogation. Edwards clearly makes such statements inadmissible, and petitioner's conviction should be set aside.

3. In one all-important area, counsel's representation was indeed "limited" --- not by its scope, but by access, since State authorities on five (5) separate occasions denied counsel's request to confer with petitioner.

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IIA.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE WILLFUL AND INTENTIONAL REFUSAL BY IOWA AUTHORITIES TO ALLOW APPOINTED COUNSEL INITIAL ACCESS TO HIS CLIENT UNTIL A WRITTEN STATEMENT HAD BEEN OBTAINED BY GEORGIA AUTHORITIES VIOLATES PETITIONER'S RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

At petitioner's request, an attorney, James A. Thomas, was appointed to represent him. Sheriff Brown and County Attorney Green (both Iowa police authorities) denied Thomas initial access to petitioner until a written statement had been obtained by Georgia authorities. At trial, Thomas testified:

> A. . . . The next morning -- I generally get to the office early, eight or eight-thirty; and at or before nine, close to nine, I went to the courthouse, which is directly across the street. We have a system similar to Crawfordville; that is, the courthouse is in the middle of a square; my office is directly across the street on the west side of the courthouse of the square. I went to the Sheriff's office, which is on the second floor of the courthouse, and the nature of the allegations were such that there were quite a few newsmen there -- television and what have you, from Omaha. The Sheriff's office is divided into three separate offices -- the main meeting room, and a private office for the Sheriff on the left, and an interrogation office on the right, or on the west.

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I went into the main meeting room and there were numerous news people there; Merle Brown was there, several other gentlemen that I didn't know; subsequently, I found out that they were members of the Bureau of Criminal Investigation from Georgia -- as I said, Merle Brown, the Mills County Sheriff. I believe that at that time I first asked Merle Brown, who is the only -- one of the few faces that I knew.

Q. Merle Brown is the Sheriff?

A. Yes, he was the Mill's County Sheriff at that time. And I asked Sheriff Brown where everyone was; and as I remember it, his response was then, "The Defendants are still in jail and would be brought over." The -- between nine and nine-fifteen I, again, asked Merle Brown, the Sheriff, where they were because the jail, itself, is about fifty yards from the Sheriff's office; and so, a fifteen minute delay wasn't necessary; and I received a response, which I don't remember what was said, but it was not -- it was an evasive type of answer, something to the effect that, "Well, they're tied up," or something like this. I then asked for the County Attorney, and he was in Sheriff Brown's private office, which adjoins the main room. I announced myself and went into the room, and Walter Green, the Mills County Prosecuting Attorney, Mr. Goolsby, the Georgia District Attorney, were there; there may have been a third party, I don't remember; but I remember those two being there.

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And, of course, exchanged very gracious -- meeting Mr. Goolsby, he was very kind and courteous, and said, "Good morning," to Walt; and said that I want to see my clients, meaning both, Mr. Wilson and Mr. Cervi. And Walter's reaction was even more evasive than Mr. Brown's, but I don't remember his exact words or comment that he made; but the effect of it was, "Well, it's a nice day," or something to that effect. And I then said, "Walt, I want to see Mr. Wilson and Mr. Cervi," "They are busy now; they'll be through with them in a few minutes," was his response. And I made a suggestion, I said, "Walt, this is too serious of a matter; let's not do something that we're going to have red faces about somewhere down the road." And both, Mr. Goolsby and Walter said, "It will be just a few minutes, Mr. Thomas." I excused myself from the room; I went to the Clerk's office which was down the hall from the Sheriff's office, had a cup of coffee, received a call from Matt Walsh. Matt explained to me that he had been contacted by the Defendant's father, who apparently is a detective out in California, and wanted to know the -- what was going on. I explained to him that I attempted to reach my clients, both, Cervi and Wilson, and was refused permission to do so. He was upset at that; and said, "Will you please make sure that you get -- have a chance to see Mr. Cervi now, and tell him to remain quiet until I get there." I said, "Matt, I've done it;

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but I'll do it again." I went back to the Sheriff's office; I went back and announced my presence, knocked on the door and was welcomed in; and I said, "I want to see -- Walt, I want to see my men now; and I got a call from Matt and he wants me to reassure -- or, make that same statement for him." And Walt said, "Well, they're just about through." And I said, "Walt, do you have any idea what you're saying?" He said, "Well, they'll be through in just a few minutes." And I said, "Well, mark your watches what time these comments were made; I want you to recognize that I demanded the right to see my clients at nine-thirty, which was a few minutes ago, and, again, right now." And he said, "It will be duly noted," or something to that effect. And I excused myself, and -- do you wish for me to continue on with the rest of the morning or not? (T 184-188).

Thomas' testimony was corroborated in every significant detail by County Attorney H. Walter Green. (T 1344-1347). From these two sources, the following timetable can be constructed for March 4, 1977:

(a) 9:00 A.M.-9:15 A.M.

Attorney Thomas arrived at the courthouse and was denied permission to see his client by Sheriff Brown;

(b) 9:15 A.M.-9:30 A.M.

Attorney Thomas is denied for the second time permission to see his client by Sheriff Brown;

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(c) 9:30 A.M.

Attorney Thomas is twice denied permission (these the third and fourth times) to see his client by Mills County, (Iowa) Attorney Green and Georgia District Attorney Goolsby.

(d) 9:45 A.M.

Attorney Thomas, for the fifth time, is denied access to his client by Mills County (Iowa) Attorney Green and Georgia District Attorney Goolsby.

(e) Petitioner's "Waiver of Counsel" form was signed at 10:06 A.M.

This abuse of authority by Iowa police authorities was condemned eighteen years ago in Escobedo v. Illinois, 378 US 478; 84 S.Ct. 1758; 12 LEd2d 977 (1964). These principles are so firmly established that their restatement here is unnecessary.

Because official misconduct is so egregious in this case, the Court is respectfully u ged to adopt a per se rule which would automatically exclude from evidence any statement obtained under like circumstances without regard to any consideration of waiver, who initiated the interrogation, or other qualifying condition. The deception practiced here makes a mockery of pertinent Supreme Court decisions and the Constitution. Such a holding would stop it.

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III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A STATE PROSECUTOR VIOLATED SIMMONS v. UNITED STATES, 390 US 377 (1968) BY ATTEMPTING TO EXAMINE PETITIONER DURING THE SENTENCING PHASE OF HIS TRIAL, WHICH RESULTED IN IMPOSITION OF THE DEATH PENALTY, ABOUT MATTERS CONSTITUTIONALLY-PROTECTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Simmons v. United States, 390 US 377, 393; 88 S.Ct. 967; 19 LEd2d 1247 (1968), held:

> ". . . Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."

This holding, and its constitutional underpinnings, were swiftly emasculated by the prosecutor at petitioner's trial. After conviction, Cervi took the stand and testified at length to the jury before sentencing. His cross-examination is a grim example of governmental misconduct at its worst:

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CROSS-EXAMINATION OF DEFENDANT BY MR. GOOLSBY IN PRESENTENCE HEARING: (T 1063).

Q. And you are a Christian? . . . You have testified in this case before today, haven't you?

A. Yes, sir. I have.

Q. And you were a Christian then, weren't you?

A. Yes, sir. I was.

Q. And you took the Fifth Amendment of the Constitution of the United States, didn't you?

MR. IVEY: Your Honor, I object to this; and ask the Court to declare a mistrial. That was in a Motion to Suppress hearing before the Court alone.

MR. GOOLSBY: In this court.

MR. IVEY: That is the most improper question I have ever heard.

MR. GOOLSBY: Well, I don't think it is; and I -- if you want to excuse the Jury, I've got no reason . . .

MR. IVEY: I don't think there is any point -- I renew my request for a mistrial. Mr. Goolsby is intentionally trying to prejudice this Jury improperly, and he knows that. (T 1063, 1064).

* * *

MR. IVEY: Your Honor, that testimony was in a Motion to Suppress hearing held before you . . .

THE COURT: I understand that, but it does -- it may or may not depend upon the finding of the Jury; it might reflect upon what he contends at the present time. I am going

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to overrule your objection.

MR. IVEY: Your Honor, you have overruled my objection -- I would like to state further for the record because this, I think . . .

THE COURT: Yes, sir.

MR. IVEY: . . . is highly improper, an intentional effort to prejudice the Jury. He did take the Fifth Amendment on the facts of the confession at my direction.

MR. GOOLSBY: Mr. -- I'm sorry, I want to answer that.

MR. IVEY: We contested the propriety of him being denied counsel that had been appointed to him, and that was the purpose. (T 1064, 1065).

(JURORS ARE REMOVED FROM THE COURTROOM AT 5:'3 P.M.) (T 1065).

* * *

MR. IVEY: I don't think any jury would matter now. (T 1068).

* * *

MR. IVEY: He did not testify at all, Your Honor. He took the Fifth Amendment, which is a right the Constitution gives him.

THE COURT: In the trial of the case, he did not testify.

MR. GOOLSBY: I'm not talking about the trial of the case.

MR. IVEY: He took the Fifth Amendment, and I'd like this to be on the record, at my direction at that time on the contents of the confession. Now, if you're asking him if the contents of the confession are true . . .

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MR. GOOLSBY: I'm going into that when I get the Jury back, but I want to know now if a Christian -- if he feels that a Christian needs to take the constitutional amendment to keep the truth out of a case in court? -- That's the question I am ultimately going to ask.

MR. IVEY: The Constitution covers Christians, infidels. and anybody else. (T 1069, 1070).

* * *

Q. Then the answer to this question is then -- if I understand you correctly, and tell me if I'm wrong -- that your Christian principles and beliefs give you the right to withhold the truth from this Court? -- Regardless of the Constitution, I am talking about your Christian -- your new found life gives you the right to withhold the truth from this Court to let it reach a verdict of the truth?

MR. IVEY: Your Honor, might I object to that question and any response thereto; the Constitution of the United States places the burden of proof in every respect on the State. The man invoked the Fifth Amendment at the direction of counsel; he did not have to answer that question. No court in this Country since 1776 has required that . . .

THE COURT: Yes, sir. And, of course, I'm sure no court would require it.

MR. IVEY: Well, then now can this man on trial now for his very life -- how can the District Attorney be allowed to parade

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that in front of this Jury? -- At this stage of the trial or proceedings . . .

MR. GOOLSBY: All right. Let me say how I can . . .

MR. IVEY: An impropriety as such cannot be repaired.

MR. GOOLSBY: Let me tell you how I can do it.

MR. IVEY: I saw how you can do it. (T 1071, 1072).

* * *

MR. IVEY: It's not a question of withholding any truth. The confession was not contested. That confession was introduced in evidence by Mr. Goolsby and read by Mr. Ingram verbatim to the Jury.

MR. GOOLSBY: It is contested.

MR. IVEY: I contested the constitutional right to elicit a confession from this witness when he had an attorney and they wouldn't let him be there. That's what I contested. When he was on that stand before you on a constitutional question of exclusion, I instructed him not to testify about the contents of the confession, which is what Mr. Goolsby has taken out of -- you know, if it were possible, we wouldn't be doing it before you to begin with. We wouldn't have a Motion to Suppress outside the presence of a jury. Now, in the sentencing phase, he has taken a man who has invoked something that it was his right to invoke, and has thrown that out in front of the Jury that is going to determine whether he lives or

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dies and claims that he is withholding something. Mr. Goolsby had the evidence; he has used it in the trial of the case, and he got him convicted. Now, he is going to turn around and hammer him on the head with it. (T 1073, 1074).

* * *

THE COURT: No, sir. I am going to admonish the Jury to disregard what has been said about any other hearing or claiming of the Fifth Amendment.

MR. IVEY: Your Honor, I would ask that the Court go further than admonishing and explain to them . . . (T 1076).

* * *

MR. IVEY: Your Honor, I do not know that any damage can be repaired now. This is making a mockery of the sentencing procedure, really. (T 1081).

* * *

MR. IVEY: I would strongly urge the Court to give some instruction to the Jury, admonishment to the District Attorney, about the Fifth Amendment. I just do not . . .

THE COURT: Bring the Jury back, and let's proceed with the trial. (T 1083).

(JURORS ARE RETURNED TO THE COURTROOM AT 6:10 P.M.) (T1083)

Although petitioner's counsel made several timely motions for mistrial, and also requested the trial judge to censure, or admonish, the prosecutor in the jury's presence, no adequate curative action (by now only a figment of the imagination) was attempted. The subsequent death sentence was predictable and virtually inevitable.

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On appeal, the Georgia Supreme Court, in a four-justice majority (one dissent, one absent, and one concurring in judgment only), struggled dutifully to avoid the Simmons mandate through an illusory distinction, stating:

(A-9)

> "[W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."
> (Emphasis supplied in original Opinion).

By differentiating "guilt" from "sentencing", the Georgia court expounded a principle of criminal jurisprudence formidable in its illogic. These constitutional safeguards, which have endured almost two centuries and which protect every defendant accused even of violating a city ordinance, will no longer apply in Georgia to one whose very life is at stake.

This startling incongruity means that instead of relaxing rules of evidence and procedure during the sentencing phase of the trial to the defendant's benefit, just the opposite will occur in Georgia. Rather than permit one convicted of a capital offense to show the jury in mitigation every reason why death is inappropriate, the Georgia defendant who testifies now risks exposure to the gamut of prosecutorial impropriety without remedy.

Although the majority stated in a temporizing gesture, ". . .[W]e do not approve of such a practice", (A-9), it concluded nonetheless that the questioning of petitioner did not constitute reversible error. It was held harmless by the Georgia court because,

(A-9)

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". . . The appellant stood before the jury a convicted murderer and such questioning could not have prejudiced him as to sentence, especially when he admitted his guilt."

If such reasoning as this is reflective of the law as articulared by this Court in capital cases, why do we bother with the charade of sentencing once guilt has been determined? Clearly, such is not the case, and this Court is respectfully urged to insure that this travesty cannot be repeated by expressly extending the holding in Simmons v. United States, supra, to include the sentencing phase of any criminal trial, and, further, by granting a summary reversal of petitioner's death sentence.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

IVEY & ASSOCIATES, P. A.

O. Torbitt Ivey, Jr.,
ATTORNEYS OF RECORD FOR PETITIONER.

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No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ALBERT CERVI, :

Petitioner, : A 520

v. :

GEORGIA, :

Respondent. :

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I served the annexed Petition for Certiorari on respondent by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Honorable Michael J. Bowers, The Attorney General
136 State Judicial Building
Atlanta, Georgia 30334

All parties required to be served have been served.

Done this 18th day of January, 1982.

O. Torbitt Ivey Jr.

O. TORBITT IVEY, JR., ATTORNEY FOR PETITIONER.

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Appendix

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YOU ARE TO NOTIFY
THE DEFENDANT OF THIS
DECISION WITHIN 3 DAYS.

In the Supreme Court of Georgia Decided: SEP 29 1981

37316. CERVI v. THE STATE.

MARSHALL, Justice.

Michael Cervi was indicted for murder, kidnapping, armed robbery and motor vehicle theft. A jury found him guilty on all counts and sentenced him to death for the murder, kidnapping with bodily injury and armed robbery. A seven year sentence was imposed for motor vehicle theft.

Cervi was an enlisted man in the U. S. Navy. After being turned down for leave, he and a shipmate, Robert Wilson, decided to take an "unauthorized leave." The pair left Charleston, South Carolina, hitchhiking. Outside Columbia, S. C., they were given a ride by Dr. Kenneth Lawrence, who was on his way to Atlanta, Georgia. When the doctor stopped and wnet inside a fast food restaurant for dinner, Wilson and Cervi planned to steal his car. Just outside Augusta, Cervi took a .30.30 rifle out of his sea bag and ordered Dr. Lawrence to exit off the Interstate onto U. S. 278. The pair took ten $100 bills from Dr. Lawrence and proceeded to march him some 150 yards off the road into a wooded area where he was tied to a tree using his necktie. Wilson hit Dr. Lawrence in the head several times with the butt of the rifle and Cervi stabbed him in the neck.

Thereafter, the pair departed in Dr. Lawrence's car. Dr. Lawrence managed to free himself and get to the highway, from whence he was taken to the hospital. He died the next day, but was able to identify Wilson and Cervi as his assailants prior to death. The two defendants were stopped for speeding while still driving Dr. Lawrence's vehicle in Iowa. A check of the license revealed that they were wanted for murder in Georgia, and they were incarcerated. The appellant waived extradition and was returned to Georgia.

1. Enumerations of error 1, 2 and 3 contend that the verdict is contrary to law, contrary to the evidence and against the weight of the evidence. The appellant introduced no evidence at the guilt or innocence phase of the trial and, from a review of the trial transcript, the evidence amply supported the verdict and authorized a reasonable trier of fact to so find beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 302 (99 SC 2781, 61 LE2d 560) (1979), and Tucker v. State, 244 Ga. 721 (1) (261 SE2d 635) (1979). There is no merit in these enumerations of error.

2. Enumerations of error 4, 5, 6, 7 and 22 contend that the trial court erred in overruling the appellant's motion to suppress his confession, the physical evidence recovered from the victim's car, and oral admissions made while on the return flight to Georgia.

The appellant contends that his in-custody confession should be suppressed because of the following events: After the appellant's arrest about 9:30 a.m., he was taken before a magistrate at 4:00 p.m. for a probable-cause hearing, as required by Iowa law. He was advised of his right to counsel and asked if he wished

to have counsel appointed, to which he answered in the affirmative. The hearing was continued until 10:00 a.m. the following day. During the night, two Georgia Bureau of Investigation agents and the district attorney from Toombs Circuit arrived in Iowa. They were not informed of the request for representation, and they were allowed to interview the defendants. Each GBI agent was accompanied by an Iowa agent, while the district attorney conferred with his Iowa counterpart. Each of the defendants signed a written acknowledgement of his Miranda rights and waiver of counsel prior to interrogation and making a written confession. Meanwhile, appointed counsel had arrived, requested to see his clients, and was told to wait a few minutes and they would be made available.

The question thus presented is whether the request for counsel at the Iowa probable-cause hearing precluded interrogation of the appellant by the Georgia investigators without notifying appointed counsel and allowing him to be present.

The appellant was arrested on the basis of a Georgia warrant charging murder, and the purpose of the hearing was to determine if sufficient cause existed to hold the appellant for extradition to Georgia. The appellant had not been interrogated by the Iowa authorities, who were acting in a custodial capacity pending extradition. Nor did the appellant invoke his right to have counsel present during custodial interrogation. Furthermore, the Georgia authorities were completely unaware of the appointment of counsel. Therefore, we hold that, under the facts of this case, the appointment of counsel by one jurisdiction for the limited purpose of representation at a probable-cause hearing and

extradition proceeding, did not prevent the appellant from giving an informed waiver of counsel prior to interrogation by the requesting state. The actions of the Georgia authorities were not a violation of the right to counsel as set forth by the U. S. Supreme Court in Edwards v. Arizona, U. S. (Case No. 79-5269, decided May 18, 1981).

There was no evidence of any threats, intimidations, promises or inducements. The trial court did not err in overruling the appellant's motion to supress his confession and allowing it in evidence. Nor did the trial court err in failing to suppress statements made by the appellant to officers as he was being transported back to this state as the appellant had the benefit of his Miranda warnings. Willis v. State, 243 Ga. 185 (253 SE2d 70) (1979).

The appellant's remaining contention, that the physical evidence obtained from the victim's vehicle should be suppressed, likewise has no merit, since the appellant has no standing to complain of the search of property belonging to another. Rakas v. Illinois, 439 U. S. 128 (99 SC 421, 58 LE2d 387) (1978); Marshall v. State, 153 Ga. App. 198 (264 SE2d 718) (1980); Meyer v. State, 150 Ga. App. 613 (258 SE2d 217) (1979).

3. Enumerations of error 8, 9, 10 and 11 contend that the trial court erred in denying the appellant's motion for change of venue because of pre-trial publicity and financial burden on the taxpayers of the county. In addition, it is argued that because of disqualifications under Witherspoon, the appellant was denied a cross-section of the community from which to choose a jury.

The appellant's only argument at the hearing on the motion for change of venue was that, because 89

black veniremen were disqualified under Witherspoon, leaving only nine blacks on the jury panels put upon the appellant, the panel did not represent a cross-section of the community. This argument is without merit. Brown v. State, 247 Ga. 298 (3) (275 SE2d 52) (1981). Of the first panel put upon the appellant, four were black, and the appellant struck the remaining three after the state had previously struck one, leaving the appellant with all white jurors.

There was no evidence presented as to excessive publicity, and a review of the voir dire shows that no prospective juror had formed a fixed opinion as to guilt or innocence of the appellant or was excused for prejudice. Messer v. State, 247 Ga. 316 (276 SE2d 15) (1981).

The appellant having shown no error in the denial of the motion for change of venue, we find no merit in these enumerations of error. Brooks v. State, 244 Ga. 574 (1) (261 SE2d 379) (1979).

Likewise, the appellant's enumerations of error 13, 14 and 15, raising the issue of disqualification of jurors under Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968), have no merit. Each juror stated unequivocally that he was unalterably opposed to the death penalty. Brown v. State, 247 Ga. 298, supra; Dampier v. State, 245 Ga. 427 (7) (265 SE2d 565) (1980), and Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979).

In his sixteenth enumeration of error, the appellant complains of irregularities in the giving of the oath to the jurors prior to voir dire. The record is silent as to the type of oath given. However, the appellant did not object to the form of the oath nor does he cite any harm arising from any irregular

administration of the oath. This enumeration of error is without merit. Gilreath v. State, 247 Ga. 814 (3) (SE2d) (1981).

4. Enumerations of error 17, 18 and 19 contend that the trial court erred in restricting the appellant's right to a thorough and sifting cross-examination of two witnesses for the state.

The doctor who treated the victim prior to his death was testifying using his personal notes to refresh his memory. Defense counsel had been furnished a copy of the doctor's notes. Defense counsel then sought to cross-examine the doctor on specific material contained in hospital records of the victim's treatment. As to the hospital records, the doctor testified that he had not made them, did not know who had, and could not attest to their accuracy. The trial court then restricted counsel to the material in the records that had been prepared by the doctor. We find no error.

The other witness, a GBI agent, was being cross-examined about the return flight from Iowa, specifically as to the seating arrangement. Counsel sought to use a piece of poster board to diagram the seating arrangement and to display to the jury. The state objected to the diagram's being displayed to the jury unless it was

entered in evidence. The trial court ruled that counsel may use the diagram of the seating arrangement in order to aid him in his questioning, but could not display it to the jury. Counsel was allowed to fully pursue the line of questioning, and, if error, it was harmless to restrict the use of illustrative devices. Lewyn v. Morris, 135 Ga. App. 289 (1) (217 SE2d 642) (1975).

5. Enumerations of error 20 and 21 contend that the trial court erred in allowing hearsay evidence over objection and in refusing to allow cross-examination of this witness about another witness' testimony at the preliminary hearing. The agent testified that he received information from the victim that caused him to go to Charleston, South Carolina, to investigate further. This testimony was admissible under Code § 38-302 to explain conduct. Todd v. State, 200 Ga. 582 (37 SE2d 779) (1946).

It was not error to restrict the cross-examination of this witness to his testimony. See Code § 38-1802.

6. Enumerations of error 23 and 24 contend that the trial court erred in refusing to give the appellant's request to charge on intervening cause and involuntary manslaughter.

The evidence does not support a conclusion that the victim died from any cause other than the blows to the head administered by Wilson and the stab wounds administered by Cervi. Although facts discovered in the post-mortem may have authorized different treatment, this was unknown to the attending physician and not discernible by reasonable examination. Furthermore, the trial court's charge, taken as a whole, correctly covered the subject matter of the appellant's request to charge. Teal v. State, 234 Ga. 159 (3) (214 SE2d 888) (1975).

As to the involuntary manslaughter request, the stabbing of another being a felony, Code Ann. § 26-1103 (a), the trial court did not err in failing to give these requested charges. See Crawford v. State, 245 Ga. 89 (3) (263 SE2d 131) (1980).

The appellant's reliance on Beck v. Alabama, U. S. (100 SC 2382, LE2d) (1980), is misplaced. In Beck, the Supreme Court of the United States held that Alabama's statutory procedure, which prohibited a charge on a lesser included offense in a capital felony case where the evidence authorized such a charge, was constitutionally impermissible. In this case, there is not a scintilla of evidence to support a charge of involuntary manslaughter.

7. Enumerations of error 25, 26, 27, 28 and 29 contend that the trial court erred in overruling the appellant's motions for mistrial and in failing to censure the district attorney in the presence of the jury.

The appellant testified at the sentencing phase of his trial as to his renewed faith and rebirth of his Christian beliefs. The district attorney in cross-examination questioned the appellant about his former testimony at the motion-to-suppress hearing when he invoked the Fifth Amendment as to questions on the truth of his confession. Defense counsel objected, and the jury was sent out while the objection was argued. The trial court sustained the objection and instructed state's counsel not to refer to this again nor to make reference to the appellant's failure to testify at the guilt or innocence phase of his trial. The jury returned and was instructed that any reference to the

Fifth Amendment was excluded and to erase it from their minds and let it have no bearing upon any deliberation.

The appellant contends that a mistrial should be granted, since it violated the rule set out in Simmons v. United States, 390 U. S. 377, 394 (88 SC 967, 19 LE2d 1247) (1967), where it was held: "[W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at the trial on the issue of guilt unless he makes no objection." (Emphasis supplied.)

The appellant testified during the sentencing phase of the trial and admitted cutting the victim's throat. The district attorney then cross-examined him and asked him why he pleaded not guilty. The appellant's counsel objected. While we do not approve of such a practice, such questioning was not reversible error. The appellant stood before the jury a convicted murderer and such questioning could not have prejudiced him as to sentence, especially when he admitted his guilt.

8. Enumerations of error 30, 31, 32, 33 and 34 contend that the trial court unduly restricted the testimony of the appellant's witnesses at the sentencing phase of the trial and in sequestering the witnesses.

The appellant complains of the exclusion of two newspaper articles concerning his newly found religion, which contained conclusions of the reporter after interviewing the appellant. The reporters were not called as witnesses and the appellant testified as to his religious beliefs and his renewed faith in God and Christ. The relevant testimony having been put before the jury, we see no error in excluding the articles themselves.

Whether to invoke the rule of sequestration at the sentencing phase of a capital case is always within the sound discretion of the trial court, and we find no merit in this enumeration of error.

The appellant next complains of the exclusion of the results of a polygraph test and the testimony of the polygraph operator as to its reliability. Absent an agreement of both the parties, the results of a polygraph test are not admissible. State v. Chambers, 240 Ga. 76 (239 SE2d 324) (1977).

The remaining assertion is that the testimony of his mother was unduly restricted concerning the reason why the father could not be present for the trial. The appellant's father was hospitalized with terminal cancer and, on objection by the state, the witness was restricted to facts within her knowledge. Although it is better to allow testimony of facts and circumstances deemed pertinent in mitigation at the sentencing phase of a trial where the death penalty is sought rather than adhere to the technical rule of evidence, "we find no error under the facts of this case, since the witnesses, despite the objections which were sustained, were able to convey to the jury the circumstances concerning the . . ." illness of the appellant's father. Brooks v.

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State, 244 Ga. 574 (5), supra; Collier v. State, 244 Ga. 553 (11) (261 SE2d 364) (1979).

9. Enumeration of error 41 contends that the trial court erred in transfering the appellant to the custody of the Commissioner of Offender Rehabilitation prior to any ruling on his motion for new trial or his appeal to this court. Taliaferro County does not have a jail and it was necessary that the appellant be housed in the jail of a neighboring county at the expense of Taliaferro County.

We can not say that the trial court erred in certifying that the continued custody in the local jail constituted a dangerous condition, as required under Code Ann. § 77-340 (b). The appellant was returned when his motion for new trial was heard and ruled on, and we find no merit in this enumeration of error.

10. Enumeration of error 12 is deemed abandoned and enumeration of error 42, complaining of the overruling of the appellant's motion for new trial, is not meritorious. The remaining enumerations of error, complaining of imposition of the death penalty and the constitutionality of the statute, will be dealt with in the sentence review.

SENTENCE REVIEW

As required by Georgia Laws 1973, p. 159 et seq. (Code Ann. § 27-2537 (c) (1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, and the evidence concerning the crimes and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed

under the influence of passion, prejudice, or any arbitrary factor.

The jury found the following aggravating circumstances: (a) "The offense [sic] of murder, armed robbery and kidnapping was [sic] committed while the offender was engaged in another felony (§ 27-2534.1 (b) (2)); and (b) the offense [sic] of murder, armed robbery and kidnapping was outrageously vile, horrible and inhuman in that it involved torture. Code Ann. § 27-2534.1 (b) (7).

The evidence supports a finding of both aggravating circumstances by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

However, the appellant contends that, because the jury returned a finding of an aggravating circumstance that was incomplete, the death penalty may not be imposed in this case. While we note that the jury's finding of Code Ann. § 27-2534.1 (b) (2) left out the word "capital" in referring to felonies, we need not decide whether the death penalty imposed in this case must be set aside on this ground. Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not taint the proceeding so as to invalidate the other aggravating circumstances found in the sentence of death based thereon. Green v. State, 246 Ga. 598 (21) (272 SE2d 475) (1980); Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974). No possible prejudice to the appellant resulted, because there was evidence of a capital felony properly before the jury, and such evidence beyond a reasonable doubt would support a finding

that the murder occurred during a kidnapping with bodily injury and an armed robbery. Green v. State, supra.

In that the sentence of death in this case rests upon a finding of Code Ann. § 27-2534.1 (b) (7), it must be reviewed in light of the United States Supreme Court's decision in Godfrey v. Georgia, 446 U. S. 420 (100 SC 1759, 64 LE2d 398) (1980), as construed by this court in Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980). "Torture," as the term is used in the statute, occurs when the victim is subjected to serious physical abuse prior to death. Hance v. State, supra. The victim in this case was not killed instantaneously, but was beaten with the butt of a rifle and had his throat cut a minimum of three or a maximum of six times. He was tied to a tree and left to die after having suffered such physical abuse. The victim did not die until one day later. This was not a domestic murder, and the victim gave the appellant no reason whatsoever to assault him and was in no manner threatening. Rather, he had befriended the victim and the co-defendant by giving them a ride. The appellant fled and attempted in every manner to hide his crime. See Godfrey v. Georgia, supra. The murder was outrageously or wantonly vile, horrible and inhuman in that this murder is distinguished from ordinary murders in which the death penalty is not appropriate. Justus v. State, 247 Ga. 276 (276 SE2d 242) (1981); Green v. State, 246 Ga. 598, supra. Under the facts of this case, this court finds that the murder was of the type universally condemned by civilized society as wantonly vile, horrible or inhuman as it involved torture to the victim, as set forth above.

We have reviewed the trial court's charge to the jury and found that it is not subject to the defects dealt with in Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977), or in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977).

The trial court sent out with the jury a copy of its charge during the sentencing phase of the trial, along with a written form to be used in returning the jury's findings. The appellant contends that the form used was unconstitutionally suggestive in that it placed undue emphasis on aggravating circumstances and failed to contain any reference to or space for the inclusion of mitigating circumstances which would serve to prevent the imposition of a death sentence. We do not agree. The material sent out with the jury conformed to the standard set forth in Fleming v. State, supra, and Hawes v. State, supra. A definition of mitigating circumstances was contained in the material, and the form specifically provided for the imposition of a life sentence even though the jury found the existence of aggravating circumstances. The appellant's thirty-fifth enumeration of error is therefore without merit. See Strickland v. State, 247 Ga. 219 (275 SE2d 29) (1981).

The appellant's co-defendant, Robert Wayne Wilson, was sentenced to life imprisonment. The question is thus presented whether, in light of the lesser sentence imposed on the co-defendant, the appellant's sentence to death is disproportionate.

Each case must be evaluated on its unique factual circumstance, as there is no simplistic rule that one co-defendant may not be sentenced to death when another co-defendant receives a lesser penalty. Justus v.

State, 247 Ga. 276, supra; McConkey v. State, 245 Ga. 108 (263 SE2d 146) (1980); Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979). We find material distinctions between the appellant's case and the case of the co-defendant. While it is true that the victim died from the combination of the physical abuse imposed upon his person by both defendants, the cutting of a human's throat illustrates an absolute intent to take life, which is more culpable under the facts of this case than the beating of a human being with the rifle butt. The appellant's statement negates his argument that he was coerced into killing the victim in that he himself testified that Wilson said "do it," but he did not point the rifle at him, he simply had it pointed down towards the ground. See Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980). Also, it must be noted that the appellant supplied the deadly weapons used in the armed robbery of the victim which ultimately led to the death of the victim. Juries in similar circumstances have sentenced one participant in a murder to death while the same penalty has not been imposed on other participants. Collins v. State, supra.

We find that the appellant's sentence to death is neither excessive nor disproportionate to the penalty imposed in the case of his co-defendant. In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support the affirmance of the death penalty.

This was a brutal killing of an armed-robbery and kidnap victim for the sole purpose of financial gain and in order to eliminate witnesses. The 21 cases in which the

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death penalty was imposed support the death penalty in the instant case. All of these cases involve the deliberate, unprovoked killing of a robbery victim or victims, and thus show the jury's willingness to give the death penalty under these circumstances. The appellant's sentence to death for murder, armed robbery, and kidnapping with bodily injury, is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. Jordan, C.J., Clarke and Smith concur. Hill, P.J., dissents as to Divisions 2 and 7. Gregory, J., concurs in the judgment only.

37316. CERVI v: THE STATE.

APPENDIX

Justus v. State, 247 Ga. 276 (276 SE2d 242) (1981); Solomon v. State, 247 Ga. 27 (277 SE2d 1) (1980); Dick v. State, 246 Ga. 697 (273 SE2d 124) (1980); Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980); Tucker v. State, 244 Ga.721 (261 SE2d 635) (1979); Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Cobb v. State, 244 Ga. 344 (260 SE2d 60) (1979); Baker v. State, 243 Ga. 710 (257 SE2d 192) (1979); Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979); Potts v. State, 241 Ga. 67 (243 SE2d 510) (1978); Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978); Stanley v. State, 240 Ga. 341 (241 SE2d 173) (1977); Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976); Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975); Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); Hunter v. State, 231 Ga. 494 (202 SE2d 441) (1973); Kramer v. State, 230 Ga. 855 (199 SE2d 805) (1973); Lingo v. State, 226 Ga. 496 (175 SE2d 657) (1970).

THE MOTION T A REHEARING
WAS DENIED TODAY OCT 20 1981

All the Justices concur, except Hill, P.J., dissents. Welborn, J. not participating.

37316. CERVI v. STATE

Please substitute a new p. 16 in the above-styled opinion. New material was added in the last paragraph before the judgment line on motion for rehearing.

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APPLICANT'S APPENDIX B

death penalty was imposed support the death penalty in the instant case. All of these cases involve the deliberate, unprovoked killing of a robbery victim or victims, and thus show the jury's willingness to give the death penalty under these circumstances. The appellant's sentence to death for murder, and kidnapping with bodily injury, is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant. However, the appellant's sentence to death for armed robbery must be set aside and the appellant resentenced as to that offense. Floyd v. State, 333 Ga. 280, 285 (210 SE2d 810) (1974); Gregg v. State, 233 Ga. 117, 126 (6) (210 SE2d 659) (1974); Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975).

Judgment affirmed. Jordan, C.J., Clarke and Smith, JJ., concur. Hill, P.J., dissents as to Divisions 2 and 7. Gregory, J., concurs in the judgment only.

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Supreme Court of the United States

No. A-520

MICHAEL ALBERT CERVI,

Petitioner,

v.

GEORGIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 18, 1982.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 14th day of December, 1981.

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APPLICANT'S APPENDIX C

RECEIVED
JAN 21 1982
Office of THE CLERK
SUPREME COURT, U.S.

NO. 81 6081

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

MICHAEL ALBERT CERVI, :
Petitioner, :
v. : A 520
GEORGIA, :
Respondent. :

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, MICHAEL ALBERT CERVI, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Georgia Diagnostic & Classification Center in Jackson, Georgia. Mr. Cervi's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

O. Torbitt Ivey Jr.

O. TORBITT IVEY, JR.,
ATTORNEY FOR PETITIONER.

LAW OFFICES OF
IVEY & ASSOCIATES
A PROFESSIONAL
ASSOCIATION
457 GREENE STREET
P. O. BOX 1418
AUGUSTA, GA. 30903
(404) 722-1891

NO. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

MICHAEL ALBERT CERVI, :

Petitioner, :

v. : A 520

GEORGIA, :

Respondent. :

AFFIDAVIT OF COUNSEL

STATE OF GEORGIA,

COUNTY OF RICHMOND.

O. TORBITT IVEY, JR., being duly sworn, states:

1. I am an attorney for MICHAEL ALBERT CERVI, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Cervi's motion for leave to proceed in forma pauperis. My representation of Mr. Cervi is without remuneration from petitioner.

2. Mr. Cervi is presently in the custody of the State of Georgia and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Cervi by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Cervi is attached hereto.

3. Counsel has represented Mr. Cervi at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Cervi is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Cervi is entitled to redress in

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437 GREENE STREET
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this action.

O. Torbitt Ivey Jr

O. TORBITT IVEY, JR.

Sworn to and subscribed before me,
this 18th day of January, 1982.

Alta M. Sunden

Notary Public, Richmond County, Georgia.

My Commission Expires: March 4, 1984.

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IVEY & ASSOCIATES
A PROFESSIONAL
ASSOCIATION
457 GREENE STREET
P. O. BOX 1413
AUGUSTA, GA. 30903
(404) 722-1891

IN THE SUPREME COURT OF THE UNITED STATES

NO. A-520

MICHAEL ALBERT CERVI,	:	IN RE: APPLICATION FOR
Petitioner,	:	WRIT OF CERTIORARI
v.	:	
GEORGIA.	:	

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, MICHAEL ALBERT CERVI, being first duly sworn, depose and say that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that I am unemployed; that I have received within the past twelve months no money from business, profession, or self-employment; rent payments, interest, or dividends, pension, annuities or life insurance payments; gifts or inheritances, or any other source; that I own no cash in a checking or savings account; that I own no real estate, stocks, bonds, notes, automobiles, or other valuable property; that no one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael Albert Cervi

STATE OF GEORGIA,

COUNTY OF BUTTS.

MICHAEL ALBERT CERVI, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

LAW OFFICES OF
[illegible]
A PROFESSIONAL
ASSOCIATION
[illegible]
P. O. BOX 1419
[illegible], GA. 30903
(404) 722-1091

Michael Albert Cervi

Subscribed and sworn to before me,

this _____day of January, 1982.

Notary Public,

(NOTARIAL SEAL)

LAW OFFICES OF
VEY & ASSOCIATES
A PROFESSIONAL
ASSOCIATION
497 GREENE STREET
P. O. BOX 1419
AUGUSTA, GA. 30903
(404) 722-1891

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

MICHAEL ALBERT CERVI, :

Petitioner, :

v. : A 520

GEORGIA, :

Respondent. :

STATE OF GEORGIA,

COUNTY OF RICHMOND.

O. TORBITT IVEY, JR., being sworn, states:

1. I am counsel for petitioner, MICHAEL ALBERT CERVI, and I am a member of the bar of this Court.

2. On January 18, 1982, at approximately 11:55 P.M., D.S.T., I personally placed the original and nine copies of the enclosed petition for certiorari, together with a certificate of service, in an envelope properly addressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mail recepticle in the main Post Office Building on Walker Street in Augusta, Georgia, a box under the exclusive care and custody of the United States Postal Service.

O. Torbitt Ivey Jr

Sworn to and subscribed before me,
this 18th day of January, 1982.

Alta M Surden
Notary Public, Richmond County, Georgia
My Commission Expires March 4, 1984.

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IVEY & ASSOCIATES
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I served the annexed motion to proceed in forma pauperis pursuant to Rule 46 on respondent by placing copy thereof in the United States mail, first class mail, postage prepaid, addressed as follows:

Honorable Michael J. Bowers, The Attorney General
136 State Judicial Building - Capitol Square
Atlanta, Georgia 30334.

All parties required to be served have been served.

Done this 18th day of January, 1982.

O. Torbitt Ivey, Jr., Attorney for Petitioner.

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Opposition

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NO. 81-6081

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL ALBERT CERVI,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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NO. 81-6081

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL ALBERT CERVI,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari which seeks a review of a decision by the Supreme Court of Georgia in this case. This decision is recorded as Cervi v. State, 248 Ga. 325 (1981). This decision is contained in the Appendix to the petition.

QUESTIONS PRESENTED

1.

Was the petit jury in the Petitioner's case properly selected?

2.

Whether the statement of the Petitioner was admissible at his trial under the ruling in Miranda v. Arizona, 384 U.S. 436 (1966).

3.

Whether this Court will extend the case of Simmons v. United States, 390 U.S. 377 (1968) to include the sentencing phase of a death penalty case.

PART ONE

STATEMENT OF THE CASE[1]

The Petitioner, Michael Albert Cervi, and Robert Wayne Wilson were co-indicted in Taliaferro County during the February Term 1978 for motor vehicle theft and the armed robbery, kidnapping and murder of Dr. Kenneth Lawrence. (R. 14-16). A request by the county for psychiatric evaluation of the indictees was granted May 18, 1977. (R. 17-20). A Motion for Change of Venue and Motion in Limine was overruled February 1980. (R. 130, 135). Following a trial by jury, the Petitioner was found guilty on all counts and was sentenced to the death penalty for murder, kidnapping, and armed robbery and seven years for motor vehicle theft. (R. 148, 155-161). A motion for new trial was overruled and a Notice of Appeal was filed January 24, 1981. (R. 1, 187).

On Sunday February 27, 1977 the Petitioner and Robert W. Wilson kidnapped Dr. Kenneth Lawrence, robbed him of his money and car, then stabbed and beat him in a wooded area near Crawfordville, Georgia.

Petitioner and Wilson were enlisted men in the United States Navy, assigned to U.S.S. Santa Barbara in Charleston, South Carolina. (T. 565, 566). On Saturday, February 26, 1977 Petitioner and Wilson went on "unauthorized absence", comparable to "AWOL." (T. 561, 913, 922). Petitioner went to the home of

---

1/ "R" indicates record in trial court. "T" indicates trial transcripts.

a friend, Homer M. Hill, to get his 30-30 marlin rifle which he kept at Hill's trailer. (T. 560-562). Hill tried to talk Petitioner out of unauthorized absence but with no avail. (T. 562). Petitioner told Hill that he was going to California. (T. 567).

At approximately 5:00 A.M. on Saturday morning, William Cammons, a cab driver, picked up Petitioner and Wilson at the naval weapon station. (T. 579, 580). They carried a duffel bag and told Cammons that they were going to hitchhike to Texas. (T. 581). The two men wanted Cammons to take them to a dark and lonely spot approximately fifteen miles out of town on I-26. (T. 581). Cammons refused and instead took them to a Waffle House Restaurant on the interstate. (T. 581, 582). Petitioner and Wilson told the driver that they did not have cab fare, but could get it at the hotel across the highway. (T. 583). At the hotel, Petitioner and Wilson got out of the cab without paying, but left their duffel bag. (T. 584). After thirty minutes, Cammons left, since Petitioner and Wilson did not return. (T. 584). That night at approximately 6:00 P.M., Cammon received a note to go to an address on Montague Avenue in North Charleston. (T. 584). At that address, Petitioner and Wilson came out of a trailer and paid Cammons eight dollars, part of the money they owed him for cab fare. (T. 585, 586). Petitioner and Wilson did not have the remaining money. (T. 586). Cammons gave them the duffel bag and left. (T. 586).

At approximately 11:00 A.M. the next morning, Frederic Grosscup, driving from Charleston to Columbia, picked up Petitioner and Wilson, who were hitchhiking on I-26. (T. 591, 592, 594). The hitchhikers carried a duffel bag and asked if I-20 went to Texas. (T. 594). Petitioner and Wilson rode with Grosscup until early afternoon. (T. 593). At this point,

Petitioner and Wilson were offered a ride by Dr. Kenneth Lawrence. (T. 922). Dr. Lawrence drove a 1976 Ford LTD, license tag number MGJ181. (T. 605, 608).

Late Sunday afternoon, Willie Chapman was visiting his father, who lived near Crawfordville, Georgia off Highway 278 near I-20. (T. 656, 657). The house was located on a dirt road approximately five miles from the highway. (T. 657). At approximately 5:00 P.M., Chapman saw a man wearing a red handkerchief stumble out of a nearby wooded area. (T. 600, 659). Chapman later realized that the man, Dr. Lawrence, was injured and that the red scarf was actually blood. (T. 660). Chapman called for help. (T. 660, 661). While waiting for an ambulance, Dr. Lawrence was placed in a car parked at the house. (T. 661).

Taliaferro County Sheriff Dorsey Combs and Crawfordville police Frank Miller responded to Chapman's call. (T. 667, 675). They found Dr. Lawrence lying on the car seat, covered with blood from cuts on his neck. (T. 667, 668, 676). A necktie was tied around one wrist. (T. 678). Dr. Lawrence told the sheriff that he had been robbed of $1000,00 and his car, tied up and beaten with a rifle. (T. 668, 669). Dr. Lawrence described Petitioner and Wilson. (T. 672).

The victim stated that after the assailants left, he walked out of the woods to where his car had been parked and was discovered by Chapman. (T. 669). By a track of blood, the officers retraced the victim's steps to a small tree in the woods. (T. 670, 677, 681). Blood covered the tree and ground. (T. 670). The tree limbs had been cut off with a knife and the surrounding area was in disarray, indicating a struggle. (T. 670, 678, 682). GBI agent Jonathan Lawrence investigated

the crime scene and made similar observations of the wooded area. (T. 686, 688, 689). The pathway from the paved road to the crime scene, led through a wooded area, across railroad tracks and through a second wooded area to a dirt road. (T. 690). Footprints were found along the dirt road leading to the wooded area. (T. 689, 690). After talking with the victim, Agent Lawrence, placed a lookout for Dr. Lawrence's car with two white males driving. (T. 706, 711).

The ambulance arrived and transported the victim to Wills Memorial Hospital in Washington, Georgia. (T. 735). Dr. Lawrence told the ambulance attendants that his jugular vein had been cut and that he slowed the bleeding from his neck with a small string. (T. 735, 750, 752). The victim however, still suffered a severe blood loss due to the large cuts in his neck and head. (T. 745, 751, 757).

Dr. Charles Wills attended Dr. Lawrence at the hospital. (T. 766). Dr. Wills testified that the victim had three lacerations in his neck, each ranging from three to seven inches long and a laceration on his head. (T. 768, 769, 777). The victim told Dr. Wills that Petitioner and Wilson beat him in the head until he was unconscious, then they cut his neck. (T. 774, 775). Dr. Lawrence died the next day at 11:50 P.M. (T. 771). Dr. Wills testified that the cause of death was respiratory failure secondary to aspiration complications which arose from the stabbing. (T. 773, 774, 808). Dr. Wills testified that the chain of events, beating, cutting, and knocking the victim, ultimately caused Dr. Lawrence's death. (T. 775, 776).

An autopsy on the victim concluded similar findings. Dr. Larry Howard of the State Crime Lab, testified that the head laceration was caused by a heavy blunt instrument and the neck wounds were caused by a knife. (T. 828, 829). Bruises were found on the victim's eyes, left cheekbone, upper lip, right hands and legs. (T. 829-831, 834). The lip injury was made by blunt impact, possibly a foot or hand. (T. 831, 832). Abrasions and scratches were also on the victim's hands and legs. (T. 834). Dr. Howard testified that the cause of death was shock and pulmonary hemorrhage. (T. 837). Dr. Howard testified that the wounds on the neck indicated that the knife was inflicted while the victim was struggling. (T. 833).

Shortly before Dr. Lawrence died, Agent Lawrence spoke with him at the hospital. (T. 708). Based on that interview, GBI Agents Lawrence and Robert Ingram went to Charleston looking for information on two white males in the military, approximately eighteen to twenty years old, one having a name of Cerva and the other having a first name of Robbie. (T. 710, 912). Commander Ringer of the U.S.S. Santa Barbara gave the agents records on Petitioner and Wilson, two who fit the description and had been on unauthorized absence since February 26, 1977. (T. 710, 913). This information was placed on NCIC with lookout emphasis on Omaha and Hayward, California, Petitioner's and Wilson's hometowns. (T. 913).

On March 3, 1977 at 9:29 A.M. Iowa State Trooper James C. Brumbough stopped a ford LTD for speeding on I-79 in southwest Iowa. (T. 615, 616). The care bore a South Carolina license tag, number MGJ181. (T. 616). Petitioner was driving the car while Wilson laid in the back seat. (T. 619). When

asked for the car registration, Petitioner stated that the car belonged to Wilson's father. (T. 619). The car registration found in the glove compartment, showed it as being leased by Dr. Kenneth Lawrence. (T. 620). Petitioner then told the officer that the car belonged to Wilson's uncle and that they were driving to Omaha on military leave. (T. 620). Petitioner however, could not produce their leave papers. (T. 621).

Officer Brumbaugh ran the car's tag number and Petitioner's social security number through NCIC. (T. 621). The NCIC alerted that the car was stolen and Petitioner was a murder suspect. Office Brumbaugh arrested Petitioner and Wilson and transported them to Mills County Jail in Glenwood, Iowa. (T. 622, 642, 643, 650). Found in Petitioner's pockets were rifle shells, a knife and a bag of green leafy material. (T. 625).

GBI Agents Ingram and H. E. Cook, Jr. flew to Iowa to bring Petitioner and Wilson back to Georgia. (T. 857, 914). The officers interviewed Petitioner and Wilson and searched Dr. Lawrence's car. (T. 861). Found in the trunk were a 30-30 rifle, a jacket with the insignia "U.S.S. Santa Barbara", a ditty bag with Wilson's name on it, a burlap bag containing a pair of worn shoes and a receipt for a new pair, dungaree pants, a plain jacket, an instruction book for a tape player, and a suit bag with Dr. Lawrence's name tag. (T. 862, 865, 866, 874). An eight inch buck knife was found under the front seat and a photograph of Petitioner and Wilson was found in the rear floodboard. (T. 867, 871). The photograph location was Birmingham, Alabama. (T. 871). Also found in the rear floodboard was a box of 30-30 caliber cartridges and hulls, which matched those found in Petitioner's pocket at the time

of his arrest, Wilson was wearing the new shoes listed on the receipt found in the trunk. (T. 874).

Oral and written statements were made by Petitioner on March 4, 1977. (T. 861, 906, 920). Petitioner confessed the crimes after Agent Ingram told him that Dr. Lawrence had lived one day and had given him information about the crime and Petitioner and Wilson. (T. 953).

Petitioner stated that he became angry after his leave request was lost by the navy and decided to go to California without leave approval. (T. 922). Petitioner went to Hill's home and got his 30-30 marlin rifle and a box of shells. (T. 922). On Saturday, February 26th, Petitioner and Wilson left Charleston, hitchhiking. (T. 922). Originally they had planned to go to Texas, but later changed their minds. (T. 922). That night, Petitioner and Wilson, having no money, slept under a bridge on I-26 (T. 922). The next morning they found a ride to Columbia, South Carolina. (T. 927).

Outside Columbia, Dr. Lawrence offered Petitioner and Wilson a ride. (T. 922). They traveled a while, then stopped at the Krystal Restaurant in Augusta, Georgia for dinner. (T. 923). Petitioner stated, that when Dr. Lawrence'went into the restaurant to buy the three dinner, he and Wilson stayed in the car and planned to kidnap and rob Dr. Lawrence. (T. 923). On I-20 going toward Atlanta, Petitioner pulled his rifle out of the duffel bag and cocked it. (T. 923). Petitioner stated that Wilson took $1000.00 from Dr. Lawrence's wallet. (T. 923). Petitioner and Wilson told Dr. Lawrence to drive a couple miles down a side road and park. (T. 923).

Petitioner wrapped the rifle in a field jacket and walked into the woods with Wilson and Dr. Lawrence. (T. 923). They walked further through bushes, crossed railroad tracks and dirt road, and walked another two hundred yards. (T. 923). Petitioner stated that he gave Wilson his rifle. (T. 923). Petitioner stated that Wilson hit Dr. Lawrence in the head with the rifle butt and told him to stay on his knees. (T. 923).

Petitioner and Wilson discussed what they wanted to do with Dr. Lawrence, then they tied him to a tree with his necktie and put a handkerchief in his mouth for a gag. (T. 923). Petitioner stated that Wilson hit Dr. Lawrence with the rifle butt five or six more times, but the doctor was still moving. (T. 924, 941). Wilson stated to Petitioner "We have to kill him" and told Petitioner to use his knife. (T. 924, 941). Petitioner stated that he was scared. (T. 924, 941).

Petitioner got down on one knee and stuck the knife in Dr. Lawrence's throat. (T. 924, 941). Petitioner further stated "I stuck the knife in again and cut with it, pulling the knife toward me. There was blood on me and the knife." (T. 924, 941). Petitioner and Wilson left Dr. Lawrence, still alive, tied to the tree, then drove to Atlanta where they spent the night. (T. 924). They drove to Birmingham, Alabama on Monday and bought a tape player and stayed at the Days Inn on I-20. (T. 924). Petitioner stated that Wilson left the victim's watch in the motel room there. (T. 925). The following night they spent in Nashville, then continued their drive to Omaha. (T. 924). Wednesday night they slept in the car on a roadside in Missouri. (T. 924). The next day, Thursday, March 3rd, Petitioner and Wilson were arrested in Iowa. (T. 925).

Agent Cox recovered the victim's watch from the Days Inn motel. Agent Ingram testified that while flying from Iowa to Georgia, Petitioner stated that they killed Dr. Lawrence so there would not be any witnesses. (T. 928).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

A. THE SELECTION OF THE PETITIONER'S PETIT JURY AT TRIAL WAS PROPER

In the instant petition the Petitioner has alleged that this Court should grant certiorari to consider whether the alleged arbitrary exclusion for cause of eighty nine prospective black jurors deprived the Petitioner of his right of trial before a fair cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

This Court has made it clear that a State may constitutionally exclude veniremen from a jury who make it unmistakably clear, (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. Witherspoon v. Illinois, 391 U.S. 510, 522-523 and 21 (1968). This Court has further indicated in the case of Adams v. Texas, 448 U.S. 38 (1980) that a state is entitled under the Witherspoon rule to exclude jurors who are clearly not willing to consider all the penalties provided by the law and will not be able to follow the instructions provided by the trial court.

In essence, the Petitioner's argument is that because of the large number of blacks who were properly stricken for cause that this somehow produces a jury which is not a fair cross-section of the community merely because of the large

numbers involving a particular minority group. The Respondent would submit that a review of the response of each of these prospective juror shows that each was properly excused under the principles of Witherspoon v. Illinois.

As each prospective juror was properly excused under the law the Respondent would submit that the resulting petit jury was entirely constitutionally proper.

Therefore, the Petitioner's complaints in this regard are without merit.

B. THE STATEMENT OF THE PETITIONER WAS ADMISSIBLE AT HIS TRIAL UNDER THE RULING IN MIRANDA v. ARIZONA, 384 U.S. 436 (1966)

The Petitioner alleges that this Court should grant certiorari to consider whether the introduction of a written statement, obtained by Georgia authorities after the interrogation of the Petitioner as an Iowa prisoner who had earlier invoked his right to have counsel appointed and allegedly invoked his right to have counsel present, violated the Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States.

It is apparent that police may legitimately inquire whether a suspect has changed his mind about speaking to them without an attorney. See Edwards v. Arizona, opinion of Justice Powell 68 L.Ed.2d 378 (1981). As Justice Powell points out in Edwards there is nothing in the Constitution that precludes police from ascertaining whether a suspect has reconsidered his original decision. Indeed, the court in Miranda v. Arizona, 384 U.S. 436 (1966) indicated that counsel's assistance can be waived.

In the instant case before allowing the statement to be heard by the jury the trial court held a Jackson v. Denno type hearing (Jackson v. Denno, 378 U.S. 368 (1964) to determine whether or not this statement was admissible under the ruling in Miranda v. Arizona, supra. (T. 86-316). The trial court then ruled that the statement could submitted to the jury for their consideration. When the testimony of this hearing was reviewed it shows that the state maintained its burden of proof on the issue of the voluntariness of the statement. The burden of proof in a Jackson v. Denno type hearing is preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1971). Further, the judge in determining whether the state has met this burden of proof must look to the totality of the circumstances. Clewis v. Texas, 386 U.S. 707 (1967).

The trial court in the instant case ruled that the statement was voluntary by the preponderance of the evidence. It is apparent, that at least some of the motivation for the trial court's ruling came from evaluation of the facts and the credibility of the witnesses. In Georgia, the determinations of fact and probability made by a judge at a Jackson v. Denno hearing are accepted by the appellate courts unless such determinations are clearly erroneous. Johnson v. State, 233 Ga. 58 (1974); High v. State, 233 Ga. 153 (1974). A review of the evidence presented at this hearing as a whole shows the trial court's determination was not clearly erroneous. (T. 86-316).

Therefore, the Petitioner's contentions in this regard are without merit.

C. THIS COURT SHOULD NOT EXTEND THE CASE OF SIMMONS v. UNITED STATES, 390 U.S. 377 (1968) BEYOND THE GUILT/INNOCENCE PORTION OF A TRIAL

In the instant petition the Petitioner alleges that this Court should grant certiorari to consider whether the district attorney violated the rule of Simmons v. United States, 390 U.S. 377 (1968) by attempting to examine the Petitioner during the sentencing phase of his trial, which sentencing phase resulted in the imposition of the death penalty, about matters allegedly protected by the Fifth Amendment to the United States Constitution. It is clear, and the Petitioner impliedly admits in his brief that the case of Simmons v. United States, 390 U.S. 377, 393 (1968) is limited to the determination of the issue of guilt. The Petitioner would suggest that this ruling should be extended after guilt has been determined, to the sentencing phase of a trial. The purpose of the Simmons case was to relieve defendants from the burden of having to select between their Fourth Amendment rights to be free from unreasonable search and seizures and their Fifth Amendment rights against self-incrimination.

This tension between these constitutional rights is not applicable in the instant situation, as the Petitioner admitted in the sentencing phase that he had participated in the cutting of the throat of the victim. (T. 1088). Therefore, as the Petitioner had admitted his complicity in the throat cutting of the victim any Fifth Amendment rights concerning self-incrimination were not at issue.

Further, as the trial court in an abundance of caution instructed the jury to totally disregard the questions concerning the use of the Fifth Amendment by the Petitioner, it is apparent that he could have been in no way harmed by these questions. (T. 83, 84, 85).

Therefore, the contentions of the Petitioner are without regard.

CONCLUSION

For all of the above and foregoing reasons, this Court should decline to grant petition for writ of certiorari filed by Michael Albert Cervi.

Respectfully submitted,

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Petitioner's Reply Brief

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VS:

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY BRIEF

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NO. 81-6081

IN THE SUPREME COURT OF THE UNITED STATES

October Term

1981.

MICHAEL ALBERT CERVI,	:	
Petitioner,	:	
VS:	:	ON PETITION FOR WRIT OF
STATE OF GEORGIA,	:	CERTIORARI TO THE
Respondent.	:	SUPREME COURT OF GEORGIA.

PETITIONER'S REPLY BRIEF

The substantive portion of Respondent's brief is five (5) pages long. After reading it, a mixed sense of puzzlement and frustration results. To borrow from boxing parlance, "they never laid a glove on" the issues; which, in most instances, is cause for celebration. Unfortunately, that is not true here.

Respondent's summary approach may be variously interpreted as:

(1) Recognition that Applicant's arguments are so formidable and persuasive that a logical reply is impossible;

or,

(2) Total failure to recognize or appreciate any issue raised by Applicant;

or,

(3) None of the above, since Respondent knows full well that this Court's ever-burgeoning caseload makes the statistical likelihood of certiorari's being granted slight indeed.

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Obviously, option number three must be correct, for how else could one rationally explain the truncated drivel offered on behalf of Georgia's Attorney General? Perhaps in trial tactics, or debate, it is wise not even to dignify a proposition by responding. Such an approach has no credence here and is, frankly, disdainful of our Highest Court.

The questions raised by Applicant on certiorari are all solidly based on the record of trial and firmly-established United States Supreme Court decisions. They cannot be reasonably addressed simply by resort to inane legalisms or trite cliches. We are confronted with a capital case in which the death penalty has resulted from denial of constitutionally-guaranteed fair trial. These contentions are already well-documented and repetition would serve no useful purpose, especially since they were ignored in toto.

As Applicant's counsel, I have no standing or right to demand that the State of Georgia do better than it has. All I can do is complain. Considering the magnitude of the penalty imposed, the validity of the issues raised, and the tribunal we are appearing before, Respondent's cavalier approach seems, at best, contemptuous of all concerned.

Lamentably, though, it will probably succeed since statistics are so weighted, understandably, against granting certiorari. Georgia has unfortunately provided the "cannon fodder" for most of our Nation's case law on capital punishment, and I now see why.

This case offends accepted standards of criminal jurisprudence, and demands redress. The record pleads for consideration. Minimal scrutiny thereof will mandate review.

Denial of certiorari would be a travesty. It would also be deplorable for shoddiness to prevail. Such result

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augers poorly for the law.

Respectfully submitted,

IVEY & ASSOCIATES, P. A.

O. Torbitt Ivey, Jr.,
ATTORNEYS FOR PETITIONER.

****

CERTIFICATE OF SERVICE

I, O. Torbitt Ivey, Jr., attorney of record for Petitioner herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of the within and foregoing reply brief upon Respondent by depositing a copy thereof in the United States Mail, with proper address and adequate postage thereon, to:

Mr. W. Davis Hewitt
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40 Capitol Square, S. W.
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prior to filing, this 6th day of April, 1982.

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